IN THE

SUPREME COURT OF THE UNITED STATES

(1)

Case No. 84 6681

ROBERT DALE HENDERSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JAMES B. GIBSON
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35 pp

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QUESTIONS PRESENTED

I. WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTIONS AND DEATH SENTENCES LEFT UNREDRESSED THE TRIAL COURT'S DENIAL OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE TRIAL COURT ADMITTED PETITIONER'S CONFESSION INTO EVIDENCE, WHERE THE STATEMENT WAS OBTAINED FOLLOWING HIS REQUEST FOR COUNSEL, CONTRARY TO THE DICTATES OF EDWARDS V. ARIZONA, 451 U.S. 447 (1981)?

II. WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTIONS AND DEATH SENTENCES LEFT UNREDRESSED THE TRIAL COURT'S DENIAL OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE TRIAL COURT DENIED PETITIONER'S MOTION TO QUASH THE JURY VENIRE FROM THE SERVICE ON WHICH A SIGNIFICANT PORTION OF THE QUALIFIED POPULATION WAS ARBITRARILY PERMITTED TO "OPT OUT," CONTRARY TO THE DICTATES OF TAYLOR V. LOUISIANA, 419 U.S. 522 (1975), PETERS V. KIFF, 407 U.S. 4930 (1972), AND DUREN V. MISSOURI, 439 U.S. 357 (1979)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this Petition is reported as Henderson v. State, 463 So. 2d 196 (Fla. 1985). It is reproduced in the appendix hereto as item one. (A 1-6)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion in this case on January 10, 1985. (A 1-6) Rehearing was denied on February 28, 1985. (A 1-6) The mandate was issued by the Florida Supreme Court on April 9, 1985. (A 7) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confer certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life, or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

> which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

3. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted by the Hernando County, Florida, Grand Jury for three counts of murder in the first degree. He was tried by a jury in Lake County, Florida, on November 16 through 20, 1982, was convicted as charged, and on November 22, 1982, he was sentenced to death. (A 1-6)

Prior to trial, Petitioner's motion to suppress statements and motion to quash the jury venire were denied. (A 8-12, 15-19) The Florida Supreme Court affirmed the convictions and death sentences. (A 1-6)

STATEMENT OF THE FACTS

Vernon Odum, Robert Dawson, and Frances Dickey each died within minutes of being shot once in the head and losing consciousness upon the bullet's impact. Their deaths might not have been discovered except that on February 6, 1982, Petitioner called the Sheriff's Office of Charlotte County, Florida, and

said that he wanted to give himself up. He told Charlotte County deputies that he had killed three hitchhikers in north Florida.

On February 10, 1982, Deputies Bakker and Hord of the Putnam County, Florida, Sheriff's Office took custody of Petitioner upon a warrant for murder in Putnam County. They were given a document signed by Petitioner declaring his desire to not discuss any criminal matters with anyone without the presence of his attorney. (A 13) During the four-and-a-half to five-hour drive to Putnam County, the deputies and Petitioner engaged in general conversation, and Deputy Hord "could tell" that Petitioner had "something on his mind." When Deputy Bakker went into the Crescent City Police Department to call the chief of detectives, Deputy Hord asked Petitioner "what he was trying to tell me." Petitioner said that there were three bodies, and he wanted them located. He was concerned that they be given a proper burial.

Petitioner signed a waiver of rights form, standard except for the addition of a paragraph indicating that he wished to exercise his right to go against his attorney's advice and talk to the deputies. The addition had been made before the deputies left the Putnam County Sheriff's Office, just in case Petitioner wanted to go against what his attorney had said and talk. (A 14)

Petitioner directed the Putnam County deputies to an undeveloped subdivision in Hernando County, where the bodies were found. In his statements, Petitioner said that he had picked up Dickey, Dawson, and Odum hitchhiking not far from Tallahassee, Florida. When one of the men wanted to stop to test fire a sawed-off shotgun that he said was stolen, and to have sex with the woman, Petitioner pulled off Highway 44 into the subdivision. During the stop, Petitioner heard the hitchhikers plotting to get some money either by murder or by kidnapping. He had the woman tape the men's wrists and ankles together with adhesive tape, and then he taped her hands and feet. He would have just left

them there, but they were "running their mouths," so he shot the two men. The woman broke her tape, and began screaming at Petitioner. He taped her back up and, again, would have left her there alive except that she said if he was going to kill her go ahead and kill her, and he shot her in the head.

Petitioner surrendered himself to authorities, was co-operative with law enforcement officers with whom he dealt and, in every matter which could be verified, accurate.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTIONS AND DEATH SENTENCES LEFT UNREDRESSED THE TRIAL COURT'S DENIAL OF PETITIONER'S RIGHTS TO ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE TRIAL COURT ADMITTED PETITIONER'S CONFESSION, WHERE THE STATEMENT WAS OBTAINED FOLLOWING HIS REQUEST FOR COUNSEL CONTRARY TO THE DICTATES OF EDWARDS V. ARIZONA, 451 U.S. 447 (1981).

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that where a defendant is undergoing custodial interrogation and he indicates his desire to exercise his right to consult with an attorney, interrogation must cease. The Court prohibited any further elicitation of information without the benefit of counsel:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present . . . If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. Miranda v. Arizona, 384 U.S. at 474.

An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further

interrogation by the authorities until counsel has been made available to him," unless he validly waives his earlier request for the assistance of counsel. Edwards v. Arizona, 451 U.S. 477, at 484-485 (1981). This rule requires, first, that courts determine whether the accused actually invoked his right to counsel and, second, whether the accused initiated further discussions with the police and knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, 451 U.S. at 485, 486; Smith v. Illinois, 469 U.S. ___, 83 L.Ed.2d 488, at 494 (1984).

Petitioner's invocation of his right to counsel at any questioning was written, unequivocal, and emphatic. (A 13) Although the written invocation specifically stated that Petitioner desired to have his attorney present during "any . . . conversation whatsoever," and the deputies claimed that they followed his declaration "to the letter," they nevertheless engaged in conversation with Petitioner during their four-and-a-half to five-hour drive to Putnam County. Deputy Bakker "felt" that Petitioner wanted to discuss "the matter" with them because he kept making "subtle statements," like "how dangerous" it was to pick up hitchhikers. Deputy Hord's feeling that Petitioner wanted to talk was based on his perceptions of Petitioner's facial expressions and physical gestures. Although Petitioner had not said anything, when the deputies stopped at the Crescent City Police Department for Deputy Bakker to use the telephone, Deputy Hord interpreted Petitioner's facial expressions to say, "Here I am. I know all these things, and all you're going to do is take me to jail." Upon being asked what Petitioner had done to specifically communicate a desire to talk, Deputy Hord said, "It's hard to describe an expression."

When Deputy Bakker left the car to make the telephone call, Deputy Hord said he turned to Petitioner and asked him, "What

are you trying to tell me?" Petitioner indicated that he wanted to help the deputy "find some bodies." Deputy Hord immediately contacted Deputy Bakker because, although the deputies said they had no intention of violationg Petitioner's invocation, they had earlier determined that in the event that Petitioner wanted to make a statement, or "information came to light," Sergeant Bakker was the officer that would deal with that. Further, although the deputies protested that they complied with Petitioner's declaration "to the letter," they also happened to carry with them, at their detective chief's instructions, a specially prepared waiver of rights form which included an extra paragraph indicating Petitioner's understanding of his "Constitutional Rights to disregard the instructions of my attorney and to speak with the Officers from Putnam County, Florida." The alteration in the standard waiver form had been made before the deputies had left the Sheriff's Office "just in case" Petitioner wanted to go against his attorney's advice.

The deputies' waiver of rights form, moreover, contained the following statement:

> "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." (A 14)

In Smith v. Illinois, supra, this Court reiterated that Edwards v. Arizona set forth a "bright-line rule" that all questioning must cease after an accused requests counsel because, in the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching"--explicit or subtle, deliberate or unintentional--might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. Oregon v. Bradshaw, 462 U.S. ___, 77 L.Ed.2d 405 (1983). After a request for an attorney, a subsequent waiver will not be deemed valid simply from the fact that a confession was given or a waiver signed. United States v. Massey, 550 F.2d 300, 307-308 (5th Circ. 1977).

The record must show that an accused was specifically offered counsel but intelligently and understandingly rejected that offer. Anything less is not a waiver. United States v. Massey, supra, at 308. Here, quite to the contrary, Petitioner was specifically told that counsel was not available, and the taking of his statement proceeded. In affirming Petitioner's convictions, the Florida Supreme Court found that the execution of a written waiver in this case was a sufficient showing that Petitioner waived his right to counsel during interrogation. (A 1-6) This finding, however, does not take into account that Petitioner's rights were violated when Deputy Hord questioned him by asking, "What are you trying to tell me?" and when the deputies extracted a written specially-prepared waiver which told him that he could not have a lawyer present. Whether it was "explicit or subtle, deliberate or unintentional," the Putnam County deputies' resumed questioning of Petitioner, after his utterly unequivocal invocation of his right to counsel, constituted impermissble overreaching. The motion to suppress his statements given thereafter (A 8-12) should have been granted.

II. THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S CONVICTIONS AND DEATH SENTENCES LEFT UNREDRESSED THE TRIAL COURT'S DENIAL OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE TRIAL COURT DENIED PETITIONER'S MOTION TO QUASH THE JURY VENIRE FROM THE SERVICE ON WHICH A SIGNIFICANT PORTION OF THE QUALIFIED POPULATION WAS ARBITRARILY PERMITTED TO "OPT OUT," CONTRARY TO THE DICTATES OF TAYLOR V. LOUISIANA, 419 U.S. 522 (1975), PETERS V. KIFF, 407 U.S. 4930 (1972), AND DUREN V. MISSOURI, 439 U.S. 357 (1979).

It is part of the established tradition in the use of

juries as instruments of public justice that the jury be a body truly representative of the community. Smith v. Texas, 311 U.S. 128 (1940). The operation of Section 40.013 of the Florida Statutes (1981), and the particular manner in which it was implemented violated Petitioner's right to an impartial jury trial.

Section 40.013(8), excusing persons 70 years of age or older, unconstitutionally discriminates on the basis of age, and allows an extremely significant portion of the qualified population to "opt out" of jury service and violates the accused's right to an impartial jury. Machetti v. Linahan, 679 F.2d 236 (11th Circ. 1982). That persons over the age of 70 represent a large percentage of Florida's population is demonstrated not only by common knowledge but by the fact that of the 68 unverified excusals unauthorizedly granted by the Clerk of Lake County, 26 were persons over 70. Although Petitioner is not a member of this class of persons, he has the right to select his jury from among them. Peters v. Kiff, 407 U.S. 4930 (1972); Duren v. Missouri, 439 U.S. 357 (1979).

Petitioner attacked the jury venire drawn for his trial in Lake County for this reason, and because of the method by which summoned jurors were excused--by the Clerk, not the judge. Taylor v. Louisiana, 419 U.S. 522 (1975), held that the States are free to grant exemptions from jury service to individuals engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. Florida has granted a statutory excuse to practicing attorneys and physicians, but only by the presiding judge in his or her discretion. §40.013(5), Fla. Stat. (1981). The Lake County Clerk excused a doctor, and dentist, without contacting a judge.

Although "hardship" is a constitutionally permissble basis for excusing a potential juror from service, Petitioner contends

that the lack of definition renders Section 40.013(6)'s "hardship, extreme inconvenience, or public necessity" vague, and that the administrative judge's delegating to the Clerk the power to define these terms was unauthorized. Taylor v. Louisiana, supra.

Petitioner's Motion to Quash Jury Venire attacked the statutory provisions for excusing jurors and the method by which they were carried out in Lake County. (A 15-19) The Florida Supreme Court's affirmance of his convictions on the basis that a cited case, Alachua County Court Executive v. Anthony, 418 So. 2d 264 (Fla. 1982), did not involve the Sixth Amendment, does not answer Petitioner's challenges. Because the statute itself and the Clerk's unauthorized improper exercise of the trial judge's excusal power violated Petitioner's right to a fair and impartial jury drawn from the community as a whole, the motion should not have been denied.

CONCLUSION

The Florida Supreme Court's refusal to apply the dictates of Edwards v. Arizona, 451 U.S. 477 (1981), resulted in a deprivation of Petitioner's constitutional right to assistance of counsel and due process of law guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court's refusal to apply to dictates of Taylor v. Louisiana, 419 U.S. 522 (1975), Peters v. Kiff, 407 U.S. 4930 (1972), and Duren v. Missouri, 439 U.S. 357 (1979), resulted in a deprivation of Petitioner's constitutional right to a trial by an impartial jury and due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Upon the foregoing reasons, Petitioner prays

that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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APPENDIX

EDITOR'S NOTE

PAGES A-1 —— A-20 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

defendant would be willing to testify to prove the victims of the cost of their incarceration. This briefly gives an indication of [illegible] the character of the Defendant, Theodore Roosevelt Randolph [illegible]

In *Gibson v. State*, 351 So.2d 948 (Fla. 1977), Delores Walker and another young woman picked up two Brazilian seamen and invited them to their home to spend the night. This was at the suggestion of the defendant and another individual who planned to "roll" the seamen. Shortly after midnight the Brazilian seamen got into a car with the defendant and the two women. After they traveled a short distance Walker drove down a dark street and stopped the car. Gibson directed the two men to get out of the car and hand over their money. As one seaman got out of the car offering his money, Gibson shot him twice in the head. Gibson was twenty-eight years of age at the time of the crime. The trial court found that the murder was committed during the commission of an armed robbery, was committed for pecuniary gain, and was especially heinous, atrocious and cruel. This Court held that the trial judge improperly combined the armed robbery with the motive of pecuniary gain. Nevertheless the death sentence was upheld.

In *Foster v. State*, 369 So.2d 928 (Fla. 1979), two young girls met defendant and the victim at a bar. They knew defendant but the victim was a stranger. The defendant and the girls had planned for one of them to have sex with the victim and make some money. The vehicle was parked in a deserted area and after some conversation concerning compensation the victim and one of the girls began to disrobe. Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. The victim was still breathing so defendant took a knife and cut the victim's spine. The girls and defendant then drove off in the victim's Winnebago and found the victim's wallet underneath a mattress. They split the money. The jury recommended a death sentence and the trial judge found that the murder was committed while defendant was engaged in the commission of a robbery and that the capital felony was especially heinous and atrocious. In our opinion we said:

> Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar) and found that there were no mitigating circumstances sufficient to overcome the heinous nature of the homicide. The defendant committed the homicide in an effort to fulfill his intentions and complete his desire, i.e., "stopping the victim off." An elderly gentleman had agreed to go out and have some fun, but the price of such activity was his life. Defendant showed no compassion when he cut the victim's throat, beat him, dragged him into the woods, and cut his spine with a knife.

Foster v. State, 369 So.2d 928, 931.

I would deny the petition for rehearing because it violates our Rules of Appellate Procedure. However, if we reconsider the sentence, other similar cases in which the death sentence was upheld would lead us to an affirmance of the reasoned judgment of judge and jury in the case before us.

BOYD, C.J., and ALDERMAN, J., concur.

Robert Dale HENDERSON, Appellant,

v.

STATE of Florida, Appellee.

No. 63084.

Supreme Court of Florida.

Jan. 10, 1985.

Rehearing Denied Feb. 25, 1985.

Defendant was convicted in the Circuit Court in and for Hernando County, L.R.

A1

Rutledge, Jr., J., of three counts of first-degree murder, and he appealed. The Supreme Court, Boyd, C.J., held that: (1) there was sufficient evidence to support finding that defendant knowingly and intelligently waived his right to have counsel present when making his statements; (2) testimony concerning defendant's admission to being wanted in other states bore no relevance to any material fact at issue, but error in denying motion to exclude reference to crimes committed in other jurisdictions was harmless; (3) photographs of victims' partially decomposed bodies were relevant; (4) there was no error in denial of motion for mistrial; (5) provisions of statute pertaining to permissible excusals from jury service did not violate Sixth Amendment; (6) evidence that victims were bound and gagged and shot one by one execution-style supported finding that murders were especially heinous, atrocious or cruel and were committed in cold, calculated and premeditated manner without pretense of moral or legal justification; and (7) Florida's death penalty law is constitutional.

Affirmed.

1. Criminal Law ⇐412.2(4)

When accused asks to see counsel, interrogation must cease; however, there is nothing to prevent accused from changing his mind and volunteering further information.

2. Criminal Law ⇐412.2(5)

Stricter standard for showing that accused has knowingly and intelligently waived previous request for counsel is met when accused voluntarily executes written waiver.

3. Criminal Law ⇐414

There was sufficient evidence, including written waivers signed before making statements in question, to support finding that defendant knowingly and intelligently waived his right to have counsel present when making those statements.

4. Criminal Law ⇐338.1, 1159.11

Testimony concerning defendant's admission to being wanted in other states bore no relevance to any material fact at issue, but error in denying motion to exclude reference to crimes committed in other jurisdictions was harmless, where amount of evidence against defendant was overwhelming.

5. Criminal Law ⇐438(6)

Photographs of victims' partially decomposed bodies were relevant to show location of victims' bodies, amount of time that passed between murders and time when bodies were found, and manner in which they were clothed, bound and gagged.

6. Criminal Law ⇐338(1)

Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court; test of admissibility is relevancy.

7. Criminal Law ⇐1144.13

It is not to be presumed that gruesome photographs will so inflame jury that they will find accused guilty in absence of evidence of guilt; rather, all jurors are presumed to be guided by logic and thus are aware that pictures of murder victims do not alone prove guilt of accused.

8. Criminal Law ⇐687

There was no error in denial of mistrial when trial judge, in advising jury of probable duration of trial, suggested that there would be second phase of trial concerned with sentencing and, upon objection by defense, gave curative instruction indicating that he only meant to estimate maximum period of time to be set aside for trial and had not made any judgment about what the evidence was likely to show.

9. Jury ⇐33(1.1)

Provisions of statute pertaining to permissible excusals from jury service did not violate Sixth Amendment, despite contention that statute operated to deny defendant right to be tried by jury drawn from venire representing "cross-section" of com-

munity. West's F.S.A. § 48.812; U.S.C.A. Const.Amend. 6.

10. Homicide ⇐354

Evidence that victims were bound and gagged and shot one by one execution-style supported finding of aggravating circumstances that murders were especially heinous, atrocious or cruel and were committed in cold, calculated and premeditated manner without pretense of moral or legal justification.

11. Criminal Law ⇐1208.1(2)

Florida's death penalty law is constitutional.

12. Homicide ⇐354

Trial court properly found that there were no mitigating circumstances sufficient to outweigh aggravating circumstances supporting death sentence for three counts of first-degree murder.

13. Homicide ⇐354

Three sentences of death for three counts of first-degree murder were appropriate under law established in similar cases.

James B. Gibson, Public Defender, and Bryan Newton, Asst. Public Defender, Daytona Beach, for appellant.

Jim Smith, Atty. Gen., and Mark C. Menser, Asst. Atty. Gen., Daytona Beach, for appellee.

BOYD, Chief Justice.

This cause is before the Court on appeal of judgments of conviction on three counts of first-degree murder. Appellant Robert Dale Henderson was sentenced to death for each of the three capital offenses. Therefore, this Court has jurisdiction of the appeal. Art. V, § 3(b)(1), Fla. Const. Upon reviewing the record and considering appellant's arguments on appeal, we find no reversible error and affirm the convictions and sentences of death.

Appellant's murder convictions are based upon the deaths of three hitchhikers in Hernando County, Florida. Henderson turned himself in to the sheriff's office in Charlotte County, Florida, on February 6, 1982. He confessed to murdering three hitchhikers in northern Florida and to several other unrelated murders. He then requested counsel and signed a "Notice of Defendant's Invocation of the Right to Counsel."

On February 10, 1982, two Putnam County sheriff's deputies took custody of Henderson for an unrelated murder and were transporting him to Putnam County by automobile when Henderson volunteered to show them where the bodies of the three hitchhikers were. They advised him of his rights, after which he signed a waiver of rights form and led them to the field where the bodies were discovered.

The following June, a Hernando County detective took custody of Henderson in Putnam County for the purpose of transporting him to Hernando County to be tried for the murders of the three hitchhikers. At first Henderson said he did not want to talk because he had already given his statement to the other deputies. Later during the ride Henderson changed his mind and, after executing a written waiver, talked about the details of the murders.

Henderson filed two pretrial motions to suppress the statements he made to the Putnam County deputies and to the Hernando County detective. The motions alleged that the statements were elicited from him after he had invoked his right to remain silent by requesting an attorney. After holding an evidentiary hearing, the trial court denied the motions.

At trial a deputy sheriff of Charlotte County testified that he was responding to a call reporting an automobile burglary when Henderson motioned to him. When the officer approached, Henderson said he wanted to give himself up for murder and that he was wanted in several states. The officer testified that Henderson surrendered a bag containing a .22 caliber revolver which Henderson said was the murder weapon. After the officer arrested Henderson and advised him of his constitution-

A-3

al rights, Henderson said that he had killed three hitchhikers in north Florida.

Another Charlotte County deputy sheriff testified that he interviewed Henderson after advising him of his constitutional rights. According to this witness, Henderson said that he shot all three hitchhikers in the head and dumped their bodies in a remote area south of Perry, Florida.

One of the Putnam County sheriff's deputies testified about Henderson's showing him the location of the bodies. The Hernando County detective testified that when he was transferring Henderson from Putnam to Hernando County, Henderson agreed to talk and gave details of the murders. A transcript of Henderson's confession was read to the jury. According to the transcript, Henderson said he picked up the hitchhikers, two male and one female, near Panama City and became concerned when he heard two of them talking about killing someone to get some money. Henderson was quoted as saying that he bound and gagged the three hitchhikers and shot them each in the head with a .22 caliber revolver.

There was substantial medical and scientific testimony corroborating Henderson's confessions. The medical examiner testified that the victims, two male and one female, had each died of a gunshot wound to the head. A firearms expert testified that the bullet fragments found in the victims had the same rifling characteristics as did bullets shot from the .22 caliber revolver found in Henderson's possession when he was arrested. Crime scene investigators testified that the victims' bodies were found bound and gagged with tape in the manner described in Henderson's statements.

The defense rested without presenting any evidence. The jury found Henderson guilty of three counts of first-degree murder.

At the penalty phase of the trial, the state presented evidence of Henderson's prior convictions for two counts of first-degree murder. The state also called the Hernando County detective who testified that Henderson told him he had no regrets and that if he had his life to live over again, he would not change anything. The defense presented evidence that Henderson was abused as a child and that he showed the police the location of the victims' bodies so they could be buried.

The jury recommended that Henderson be sentenced to death. The trial judge adopted the jury's recommendation and found as aggravating circumstances that Henderson had previously been convicted of a violent felony; that the murders were especially heinous, atrocious, or cruel; and that they were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The judge found there was no evidence of any statutory mitigating circumstances and that the nonstatutory mitigating circumstances presented were of little if any weight.

[1–3] Henderson's first point on appeal claims error in the denial of his pretrial motions to suppress the statements he made to the Putnam County deputy and the Hernando County detective. Henderson claims that these statements were improperly elicited from him after he had requested the assistance of counsel. It is true that when an accused asks to see counsel, interrogation must cease. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). However, there is nothing to prevent an accused from changing his mind and volunteering further information. "The stricter standard for showing that an accused has knowingly and intelligently waived a previous request for counsel is met when the accused voluntarily executes a written waiver." *Connody v. State*, 427 So.2d 723, 729 (Fla.1983). In this case Henderson signed written waivers before making the statements in question. We therefore conclude that there is sufficient evidence to support the finding that he knowingly and intelligently waived his right to have counsel present when making these statements.

A-4

Next Henderson argues that the trial judge erred in denying in part his motion in limine to exclude references to unrelated crimes committed in other jurisdictions. In response to Henderson's motion, the state averred that the only evidence of collateral crimes it anticipated introducing was the statement Henderson made to the arresting officer that he was turning himself in for murder and that he was wanted in several states. The trial court ruled that this statement was admissible.

[4] We agree with Henderson's contention that the testimony concerning his admission to being wanted in other states bore no relevance to any material fact at issue in this case. Hence his motion to exclude all references to crimes committed in other jurisdictions should have been granted. However, we find that the error was harmless and could not possibly have affected the outcome of the case. The amount of evidence against Henderson is simply overwhelming. There were at least four confessions to four different police officers. There was also substantial circumstantial evidence linking him to the crime and corroborating his confessions. Given the magnitude of this evidence, we do not believe that the jury was unduly or improperly influenced by the evidence that Henderson admitted to being wanted in other states.

[5-7] Next Henderson argues that the trial court erred by allowing into evidence gruesome photographs which he claims were irrelevant and repetitive. We find that the photographs, which were of the victims' partially decomposed bodies, were relevant. Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. *Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *Straight v. State*, 397 So.2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments. The photographs were relevant to show the location of the victims' bodies, the amount of time that had passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged. It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused. We therefore conclude there was no error in allowing the photographs into evidence. *Aldridge v. State*, 351 So.2d 942 (Fla.1977), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978); *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); *Swan v. State*, 322 So.2d 485 (Fla.1976).

[8] Henderson argues that the trial judge erred when, in advising the jury of the probable duration of the trial, he suggested that there would be a second phase of the trial concerned with sentencing. Because a sentencing phase would only be required upon conviction of a capital offense, appellant argues that the statement indicated to the jury that the judge thought appellant would be found guilty of at least one of the charged first-degree murder counts. Upon the raising of an objection by the defense, the judge gave a curative instruction indicating that he only meant to estimate the maximum period of time to be set aside for the trial and had not made any judgment about what the evidence was likely to show. Defense counsel moved for a mistrial and now argues that the denial of the motion was reversible error. We find the argument to be completely without merit.

[9] Henderson also argues that several of the provisions of section 40.013, Florida Statutes (1981), pertaining to permissible excusals from jury service, operated to deny him the right to be tried by a jury drawn from a venire representing a "cross-section" of the community. *See Taylor v.*

A-5

Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). He relies on *Alachua County Court Executive v. Anthony*, 418 So.2d 264 (Fla.1982). That decision held that the exemption for mothers with small children was faulty on equal protection grounds for not treating similarly situated fathers the same way. The sixth amendment was not involved in that case and we do not read it as announcing any right of defendants that would support appellant's argument here. We find appellant's challenge to be without merit. *Hitchcock v. State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 218 (1982); *McArthur v. State*, 351 So.2d 972 (Fla.1977).

[10] With respect to his sentence, Henderson argues that the trial judge erred in finding that the murders were especially heinous, atrocious or cruel. Henderson claims that the murders were not heinous, atrocious, or cruel because the victims died instantaneously from single gunshots to their heads. This argument overlooks the fact that the victims were previously bound and gagged. They could see what was happening and obviously experienced extreme fear and panic while anticipating their fate. We therefore conclude that this aggravating circumstance applies. *White v. State*, 403 So.2d 331 (Fla.1981), *cert. denied*, — U.S. —, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); *Knight v. State*, 338 So.2d 201 (Fla.1976).

Appellant also argues that the court erred in finding that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. We hold that there was sufficient evidence to support the trial judge's finding of this factor. Henderson rendered the victims helpless by binding their ankles with tape. He then coldly proceeded to shoot them one by one execution-style.

[11] Finally Henderson argues that Florida's death penalty law is unconstitutional. However, all his arguments have previously been refuted by this Court on a number of occasions and therefore do not merit any further discussion.

[12] In conclusion, the properly established aggravating circumstances are:

1. Appellant had previously been convicted of two counts of first-degree murder.

2. The murders were all heinous, atrocious, and cruel.

3. The murders were all committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.

The trial court properly found that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances found.

[13] We therefore affirm the convictions on three counts of first-degree murder. Finding that the three sentences of death are appropriate under the law established in similar cases, we affirm them also.

It is so ordered.

ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Raymond KOON, Appellant,

v.

STATE of Florida, Appellee.

No. 63322.

Supreme Court of Florida.

Jan. 10, 1985.

Rehearing Denied March 4, 1985.

Defendant was convicted in the Circuit Court, Collier County, Charles T. Carlton, J., of first-degree murder, and direct appeal

A-6

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Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Hernando County, Flori

WHEREAS, in that certain cause filed in this Court styled:

ROBERT DALE HENDERSON vs. STATE OF FLORIDA

Case No. 63,094

Your Case No. 82-202-CF

The attached opinion was rendered on January 10, 1985.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Joseph A. Boyd, Jr.

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 9th day of April, 1985.

Clerk of the Supreme Court of Florida.

A-7

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR HERNANDO COUNTY, FLORIDA.

CASE NO: 82-202-CF

STATE OF FLORIDA,

vs.

ROBERT DALE HENDERSON,

Defendant.

_____/

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FIRST MOTION TO SUPPRESS

DEFENDANT, ROBERT DALE HENDERSON, by and through the undersigned attorney, pursuant to Rule 3.190 (i), The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 12 and 16, of the State of Florida Constitution, moves the Court to enter an Order suppressing any and all statements that Defendant made to any and all law enforcement officers regarding the alleged triple homocide which is the subject of the instant cause and in support of such motion, Defendant would show:

1. On February 7, 1982, Defendant executed a Notice of Defendant's Invocation of the Right to Counsel. A copy being attached hereto and made a part hereof as Exhibit "A".

2. Pursuant to the above described declaration, Defendant among other things, indicated the following:

(a) Defendant desired to have his attorney present before and during any questioning, interrogation, interviewing or other conversations whatsoever between himself and any police agency.

(b) Defendant specifically indicated that at no time in the future would he waive any rights he had to counsel unless and until he had adequate consultation with an attorney.

3. On or about February 10, 1982, Detective Sgt. Richard W. Bakker and Detective W.C. Hord of the Putnam County Sheriff's Department arrested the Defendant in Charlotte County pursuant to an arrest warrant issued by the Honorable William E. Warren, County Judge in and for Putnam County.

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4. At the time the Defendant was taken into custody by the above-referenced officers, the said officers were served with a copy of the aforedescribed Notice of Defendant's Invocation of the Right to Counsel.

5. Defendant was then transported in the exclusive care, custody and control of the two officers from the Putnam County Sheriff's Department back to Putnam County. The trip took between three and five hours.

6. While enroute back to Putnam County, both officers freely conversed with the Defendant which was in direct violation of the declarations contained within the Defendant's Invocation of his Right to Counsel. Further, the conversations included discussions regarding Christian burial.

7. Upon arriving in Putnam County, the officers elected to stop in Crescent City for purposes of calling into headquarters.

8. During the stop, Detective Hord at some point inquired of the Defendant, "just what is it you're trying to say?"

9. Pursuant to this inquiry, Defendant then made certain incriminating statements.

10. Subsequent to the initial incriminating statements, Officer Bakker caused to have prepared a Waiver of Rights which was executed by the Defendant on the 10th day of February, 1982, a copy of the same being attached hereto and made a part hereof as Exhibit "B".

11. Upon obtaining said Waiver, Officers Bakker and Hord began interrogation of the Defendant which ultimately resulted in Defendant making a full and complete statement regarding his alleged involvement in the three homocides subject of the instant cause. Further, Defendant ultimately led law enforcement officers that same day to the actual site of the alleged homocide and the bodies located therein.

12. Defendant avers that the conduct of both officers violated the intent, meaning, spirit, and purpose of the Notice of Defendant's Invocation of Right to Counsel. Additionally, Defendant maintains that Officer Hord's question, "Just what is it you're trying to tell me?" amounts to a direct inquiry initiated by law enforcement into the Defendant's alleged criminal activity.

13. Defendant maintains that such conduct by law enforcement amounts to a violation of the earlier cited constitutional provisions as defined and applied by recent case law. In support of this position, the Defendant would cite the following cases: Massiah v. United States, 337 U.S., 201 (1964), Supreme Court; Brewer v. Williams, 431 U.S. 925 97 Supreme Court, 2200 (1977); Rhode Island v. Innis. 100 Supreme Court, 1682 (1980); Edwards v. Arizona, 101 Supreme Court, 1880,(198 and Cahill v. Rushen, 501 Federal Supplement 1219 (1982).

In the aforementioned cases, it was uniformly held that once a prisoner declares that he wishes to exercise his right to counsel and right to remain silent as set forth in United States Constitution, the State has a heavy burden to establish that any subsequent waiver is made freely and voluntarily without coercion or duress. In the Brewer decision, a similar set of circumstances existed relative to the instant cause. In that case, the defendant was suspected of having committed the murder of a ten year old girl. Prior to his admissions, he had clearly declared his intention to exercise his right to counsel and had refused to make any statements to the authorities, however, during an automobile trip, wherein he was in the exclusive care, custody and control of certain law enforcement officers, conversations resulted which ultimately let to the defendant making admissic against his interests. The court in suppressing the confessions, indicated that the conversations between law enforcement and the defendant regarding the christian burial of the decedent was tantamount to interrogation and, therefore, respondent was entitled to assistance of counsel prior to making any statement to law enforcement officials. In Rhode Island v. Innis, a similar set of circumstances arose wherein the court struck down certain incriminating statements made by the defendant in response to certain questions which although did not amount to interrogation, were interpreted by the court to be conduct intended to illicit information from the defendant. The same rational was following in the Cahill decision wherein the defendant, after having exercised his right to consult with a lawyer prior to trial, made certain confessions after trial that ultimately the government attempted to use at a ond trial. Further authority for defendant's

position can be found in the case of Edwards v. Arizona, 101 Supreme Court, 1880, (1981). In the Edwards decision, interrogation occurred subsequent to defendant's exercise of his rights to counsel. In declaring that the Defendant's constitutional rights were violated by the law enforcement authorities during their interrogation, the court held that where the defendant had invoked his right to have counsel present during custodial interrogation, as in the instant case, a valid waiver of that rights could not be established by showing only that he responded to police initiated interrogation after being again advised of his rights. Defendant further maintains that the State of Florida has embraced the above-referenced principles as the law of the State of FLorida pursuant to the decision handed down in the case of Jones v. State, 346 So.2d 639 (2d DCA, 1977). In the Jones decision, a police officer continued to engage in conversation with the defendant subsequent to defendant's exercise with the defendant. However, in rejecting the State's position, the court held that the officer's conduct clearly was intended to exact certain incriminating information from the defendant and, therefore, in fact, amounted to interrogation in violation of the defendant's earlier exercised right to counsel.

WHEREFORE Defendant prays the Court will enter an Order delcaring any admissions defendant may have made to law enforcement officers pursuant to the interrogation conducted by the Putnam County authorities inadmissible inasmuch as they were illicited from the defendant in violation of his constitutional righ and further declaring that the State shall not use as evidence against the Defendant any further statements or real evidence, specifically including, but not limited to, the three bodies which defendant led the authorities to during the course of the subject interrogation, inasmuch as the same amounts to fruit of the poison tree as set forth in the mose recent decision from the United States Supreme Court in the case of Taylor v. Alabama, Supreme Court, decided June 23,(1982), and as set forth in numerous Florida decisions.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the OFFICE OF THE STATE ATTORNEY, Hernando County Courthouse, Brooksville, Florida this 18th day of August, 1982.

HOWARD BABB, JR.
Public Defender
Office of the Public Defender

BY: John W. Springstead
JOHN W. SPRINGSTEAD
Assistant Public Defender

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EXHIBIT "A"

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA)
)
vs.) CASE NO. 82-36-CF-A-RMS
)
ROBERT HENDERSON)

NOTICE OF DEFENDANT'S INVOCATION OF THE RIGHT TO COUNSEL

I, ROBERT HENDERSON, hereby invoke and exercise my right to counsel pursuant to the 6th Amendment and 14th Amendment to the United States Constitution and Article I, Sections 9, 12 and 16 of the State of Florida Constitution and the case law thereunder.

I desire to have my attorney, the Public Defender, or one of his assistants, present before and during any questioning, interrogation, interviewing or other conversation whatsoever between myself and any police agency, prosecutor or agents thereof wherein there is any possibility that anything I say could be used against me.

I hereby announce my desire to have counsel present before anybody talks to me about any matters relating to this case or any other charges pending against me or any other criminal matter in which I am a suspect or can reasonably be expected to become a suspect based on anything I might say.

This notice is solely an exercise of my rights and in no way is to be construed as any direct or indirect admission of guilt or criminal liability.

I further state hereby that at no time in the future do I or will I waive (that is, give up) my right to have my attorney present unless and until, after adequate consultation with my attorney, I specifically waive (give up) all or part of my rights in written form.

Notice is hereby given by me and my undersigned attorney that I will litigate and seek sanctions and/or damages against anyone who violates or attempts to violate my constitutional and/or statutory rights invoked by me with this notice.

After being fully advised of my constitutional and statutory rights against self-incrimination by my attorney, I am signing this notice upon advice of counsel.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Charlotte County Sheriff's Department, P.C., Fla. State Attorney's Office, Courthouse, Punta Gorda, Florida, and Public Defender's Office, Courthouse, Punta Gorda, Florida, this 7th day of February, 1982.

DOUGLAS R. HIDSLEY
Public Defender
P. O. Drawer 1980
Fort Myers, Florida 33902-1980

Robert Henderson
Defendant

By: [signature]
(Of Counsel)

A-13

YOUR RIGHT

Pla Mount City P.D

Date 10 Feb 82

Time 1543 hrs.

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advise before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER

I have read the staement of my rights shown above. I understand what my rights are. Iam willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

I am aware that my attorney, in Charlotte County Florida, has instructed me not to speak with Law Enforcement Officers. I am also aware of my Constitutional Rights to disregard the instructions of my attorney and to speak with the Officers from Putnam County, Florida. I wish to exercise my rights and to speak with these officers.

Signed Robert D. Henderson

Witness _____

Witness _____

Time 1543 Hrs

R. C. Bobbe.

Joe Atchison

Rosalind Gayle Clark

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires June 29, 1985

EXHIBIT "B"

Defendant

Of (County)

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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

STATE OF FLORIDA,

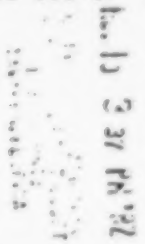
vs.

ROBERT DALE HENDERSON,

Defendant.

_____/

CASE NO. 82-898-CF



MOTION TO QUASH JURY VENIRE

THE DEFENDANT, ROBERT DALE HENDERSON, moves this Honorable Court to quash the venire drawn to serve as jurors in the above-styled cause and as grounds therefore would show:

1. Article I, Section 16 of the Florida Constitution provides in part: "In all criminal prosecutions the accused shall ... have a speedy public trial by an impartial jury ..."

2. Article I, Section 22 of the Florida Constitution provides in part: "The right of trial by jury shall be secure to all and remain inviolate."

3. One accused of a crime is entitled to a fair trial by a jury of his peers, State v. Lewis, 11 So.2d 337 (1943).

4. The Sixth Amendment of the United States Constitution guarantees to all persons the right to a trial by an impartial jury.

5. Florida Statutes dealing with jury qualifications provide in part as follows:

(a) F.S. Section 40.01 - Jurors shall be taken from the male and female persons at least eighteen (18) years of age who are citizens of the state and who are registered electors of their respective counties.

(b) F.S. Section 40.013(1) - No person who is under prosecution for any crime...shall be qualified to serve as a juror.

(c) Expectant mothers and mothers who are not employed fulltime with children under fifteen (15) years of age, upon request shall be excused from jury service.

(d) A presiding judge may, in his discretion, excuse a practicing attorney, a practicing physicial, or a person who is physically infirm from jury service.

(e) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.

(f) A person who has served as a juror in any court in his county of residence within two (2) years of the first day of January in the calendar year for which he is being considered may, upon request and submission of a sworn affidavit that such service has been rendered, be excused from jury service.

6. Florida Statute Section 40.01 is unconstitutional, in that it restricts those persons permitted to serve as jurors to those who are citizens of Florida, and who are fully qualified electors of the county.

7. Florida Statutes Section 40.013(1) is unconstitutional, in that it excludes from jury service all persons under prosecution for any crime; such statutory exclusion would permit the State Attorney to limit those eligible for jury service by simply filing an information against those persons he did not want on a jury. Such statutory exclusions flies directly in the face of a constitutional right to the presumption of innocence in that a mere accusation foreclose the right and duty of jury service.

8. Florida Statute Section 40.013(4) is unconstitutional as a denial of equal protection and due process, in that it allows a very specific class of persons to be excluded from service where no rational basis for such classification exists.

(a) Said exclusion discriminates based on sex.

(b) Said exclusion discriminates based on age.

(c) Said exclusion discriminates based on employment.

(d) Said exclusion becomes operative only upon request of a juror at which time it becomes mandatory.

9. Florida Statute Section 40.013(5) is unconstitutional, in that it gives the presiding judge unbridled discretion to exclude from service certain classes of people based on the nature of their

employment or their physical condition.

10. Florida Statute Section 40.013(6) is unconstitutional on its face, in that it is vague, ambiguous, and contains no ascertainable standards by which excuses thereunder are to be granted or denied. Terms such as hardship, extreme inconvenience, and public necessity are so uncertain by definition that the inclusion or exclusion of jurors hereunder is left to the whim of the person authorized to grant such excuses. This exclusion is an unlawful delegation of legislative authority in the absence of any ascertainable standards.

11. Florida Statute Section 40.013(7) is unconstitutional, in that it creates a class of persons based on a standard which has no reasonable relation to the subject matter.

12. Neither the U.S., nor Florida Constitution restrict the selection of jurors in any manner and surely not in the manner set forth in Florida Statute Section 40.

13. The statutory qualifications and exclusions applicable to jurors denies the Defendant the right to select jurors from the community at large.

14. The Constitutional guarantees of Equal Protection and Due Process demand that a jury be selected from a fair cross section of the community, yet Florida Statute Section 40 prohibits such selection.

15. "It is part of the established tradidion in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

Taylor v. Louisiana, 95 S.Ct. 692 (1975)

Smith v. Texas, 311 U.S. 128 (1940)

16. "The exclusion from jury service of a substantial and identifiable class of citizens, has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. When any large and identifiable segment of the community is excluded fror jury service, the effect is to remove from the jury room qualities of human nature and varieties

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of human experience, the range of which is unknown and perhaps unknowable."

Peters v. Kife, 407 U.S. 493 (1972)

17. "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the constitution have been violated."

Hernandez v. Texas, 347 U.S. 475 (1954)

18. Administrative Order 81-1 sets forth the procedures regarding disqualifications and excusals. A copy of said Order is attached hereto and incorporated herein by reference. Said Order is an unlawful delegation of judicial power, in that;

(a) Florida Statute Section 40.013 sets forth reasons that may disqualify a juror for service. Florida Statute Section 40.013(5) provides that prospective jurors satisfying this specific requirement (practicing attorney, practicing physician or a person who is physically infirm from jury service) may be excused by the presiding judge; the remainder of Section 40.013 is silent as to who has authority to excuse jurors from service.

(b) Section 40.23, F.S. (1979) sets forth the duties of the Clerk of the Court relative to prospective jurors. This portion of the Statute does not expressly grant the Clerk of the Court the authority to excuse prospective jurors under any circumstances.

(c) The Administrative Order confers the authority to excuse in all situations, except hardship, to the jury clerk.

WHEREFORE, based upon the facts and the law as expressed under Article I, Sections 2, 9, 16, and 22 of the Florida Constitution; the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 40.013 and 40.23, F.S., the Defendant respectfully requests that this Honorable Court quash the venire drawn to hear this cause.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bernie J. McCabe, Jr., Assistant State Attorney, Major Crimes Division, Office of the State Attorney, Lake County Courthouse, Tavares, Florida, this 15th day of November, 1982.

JOHN W. SPRINGSTEAD
Assistant Public Defender
Hernando County Courthouse
Brooksville, Florida 33512
(904) 796-1155

CHAPTER 40

JURORS AND PAYMENT OF JURORS AND WITNESSES

40.01 Qualifications of jurors.—Jurors shall be taken from the male and female persons at least 18 years of age who are citizens of this state and who are registered electors of their respective counties.

History.—s. 2, ch. 4115, 1891; ss. 1, 2, ch. 6122, 1901; GS 1370; RS 1571; s. 1, ch. 6431, 1913; RGS 2771, 2772; ss. 1, 2, ch. 12946, 1927; CGL 4441, 4444; s. 1, ch. 21418, 1941; ss. 1, chs. 26514, 26501, 26949, 1951; ss. 1, 2, ch. 67-154; s. 1, ch. 73-76; s. 1, ch. 79-210.

40.013 Persons disqualified or excused from jury service.—

(1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

(2) Neither the Governor, nor any Cabinet officer, nor any sheriff or his deputy, municipal police officer, clerk of court, or judge shall be qualified to be a juror.

(3) No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.

(4) Expectant mothers and mothers who are not employed full time with children under 15 years of age, upon request, shall be excused from jury service.

(5) A presiding judge may, in his discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service.

(6) A person may be excused from jury serv upon a showing of hardship, extreme inconvenien or public necessity.

(7) A person who has served as a juror in a court in his county of residence within 2 years of t first day of January in the calendar year for which is being considered may, upon request and subm sion of a sworn affidavit that such service has be rendered, be excused from jury service.

(8) A person 70 years of age or older shall be cused from jury service upon request.

History.—s. 3, ch. 3010, 1877; s. 1, ch. 6015, 1911; RS 1149; GS 1372; s. 2774; CGL 4451; s. 2, ch. 28040, 1953; s. 7, ch. 73-334; s. 1, ch. 77-102; s. 1, 77-431; s. 4, ch. 79-235; s. 1, ch. 80-170.

Note.—Former s. 40.07.

40.015 Jury districts; counties exceedi 50,000.—

(1) In any county having a population exceed 50,000 according to the last preceding decennial c sus and one or more locations in addition to the co ty seat at which the county or circuit court sits a holds jury trials, the chief judge, with the approval a majority of the circuit court judges of the circuit authorized to create a jury district for each cou house location, from which jury lists shall be select in the manner presently provided by law.

(2) In determining the boundaries of a jury d trict to serve the court located within the district, t board shall seek to avoid any exclusion of any cog zable group. Each jury district shall include at le 6,000 registered voters.

History.—s. 1, ch. 79-114; s. 2, ch. 79-210.

40.02 Selection of jury lists.—

(1) The chief judge of each circuit, or a circ judge in each county within the circuit who is des nated by the chief judge, shall request the select of a jury list in each county within the circuit dur the first week of January of each year, or as so thereafter as practicable. The chief judge or his d ignee shall direct the clerk of the court to select random a sufficient number of names, with their dresses, from the list of persons who are qualified serve as jurors under the provisions of s. 40.01 and generate a list of not fewer than 250 persons to se as jurors, which list shall be signed and verified the clerk of the court as having been selected aforesaid. A circuit judge in a county to which he been assigned may request additional jury lists necessary to prevent the jury list from becoming exhausted. When the annual jury list is prepared pur ant to the request of a chief judge or his designee, lists prepared the previous year shall be withdra from further use. If, notwithstanding this provisi some names are not withdrawn, such error or irre larity shall not invalidate any subsequent proceed or jury. The fact that any person so selected had b on a former jury list or had served as a juror in a court at any time shall not be grounds for challe of such person as a juror. If any person so selec shall be ascertained to be disqualified or incompet

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